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Supreme Court, U.S.
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No. 04-597

IN THE

Supreme Court of the United States

UNITHERM FOOD SYSTEMS, INC.,

Petitioner,

v.

SWIFT ECKRICH, INC. d/b/a
CONAGRA REFRIGERATED FOODS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether, and to what extent, a court of appeals may review the sufficiency of evidence supporting a civil jury verdict where the party requesting review made a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure before submission of the case to the jury, but neither renewed that motion under Rule 50(b) after the jury's verdict, nor moved for a new trial under Rule 59.

LIST OF PARTIES

The Petitioner herein, Plaintiff-Appellee below, is Unitherm Food Systems, Inc., a corporation organized and existing under the laws of the State of Illinois. An additional Plaintiff in the United States District Court for the Western District of Oklahoma was Jennie-O Foods, Inc., now known as Jennie-O Turkey Store, Inc. As Jennie-O's direct interest in this matter related only to the lower court's ruling on patent invalidity, and the validity of the patent is not implicated by the question presented, Jennie-O has no direct interest herein.

The Respondent, Defendant-Appellant below, is Swift-Eckrich, Inc., doing business as ConAgra Refrigerated Foods.

RULE 29.6 STATEMENT

The Petitioner has no parent and there are no publicly held companies that hold any stock of the Petitioner. Although not a Petitioner herein, Jennie-O Foods, Inc. (now known as Jennie-O Turkey Store, Inc.) is a wholly owned subsidiary of Hormel Foods Corporation, a publicly traded company.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, reported at 375 F.3d 1341, is set out at pages 1a-54a of the Appendix to the Petition for Writ of Certiorari ("Pet. App.").

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on July 12, 2004, and timely petitions for rehearing and rehearing *en banc* were denied on September 14, 2004. The Petition for a Writ of Certiorari was filed on November 2, 2004, and was granted on February 28, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 50, Federal Rules of Civil Procedure, is reproduced at Pet. App. 57a - 60a. Rule 59, Federal Rules of Civil Procedure, is reproduced at Joint Appendix ("J.A.") 155a-156a.

STATEMENT OF THE CASE

The federal circuit courts of appeals are presently divided as to whether a federal appellate court may review a jury's verdict for the sufficiency of the evidence when the issues raised on appeal were not first submitted to the consideration of the trial court in a post-verdict motion for judgment as a matter of law ("JMOL") under Rule 50(b) of the Federal Rules of Civil Procedure. ConAgra failed to file a post-verdict motion challenging the sufficiency of the evidence under Rule 50(b). ConAgra also failed to file a motion for new trial contesting the sufficiency of the evidence under Rule 59.

As ConAgra failed thereby to preserve these issues for appeal, the Federal Circuit's reversal was erroneous and this Court should affirm the trial court's judgment in favor of Unitherm.

1. Proceedings In The District Court

Unitherm Food Systems, Inc., ("Unitherm"), a manufacturer and supplier of equipment and processes used in the food industry sued Swift-Eckrich, Inc., doing business as ConAgra Refrigerated Foods, ("ConAgra") in the United States District Court for the Western District of Oklahoma alleging, *inter alia*, attempt to monopolize in violation of Section 2 of the SHERMAN ANTITRUST ACT (a *Walker Process* claim), tortious interference with prospective business relations and fraud under Oklahoma common law, and declaratory judgment for invalidity of a patent that had been issued to ConAgra. (First Amended Complaint, R. A0163-0206).[1]

On September 14, 1999, the United States Patent and Trademark Office ("Patent Office") issued to ConAgra U.S. Patent No. 5,952,027 ("the '027 Patent"), entitled "METHOD FOR BROWNING PRECOOKED, WHOLE MUSCLE MEAT PRODUCTS." (R. A0006-11). However, the process claimed in the '027 Patent is identical to a browning process which Unitherm had invented ("Unitherm Process") and which had already been on sale and in public use since the early 1990's. As discussed in the '027 Patent, the process provides a method for browning precooked turkey breasts and similar precooked meat products that is far superior to the conventional "batch house" method and other methods of browning precooked meats. (R. A0007). The process is much faster, more economical, and capable of compliance with new, more stringent government food safety requirements. It also provides significantly increased product yield and produces the taste, texture and color desired by consumers. (R. A0007-08).

In February, 2000, following the issuance of the '027 Patent, ConAgra publicized its new patent by sending threatening letters

[1] Citations to the Record ("R.") are to the appendix submitted to the Federal Circuit pursuant to Federal Circuit Rule 30.

to manufacturers of equipment that could be used to perform the process.[2] In late February and March, 2000, ConAgra sent threatening letters to seven turkey breast vendors, all of whom had purchased or been solicited to purchase the Unitherm Process. (R. A4217-19, 4471, 4473, 4475-76, 4479-80, 4494-95, 4504, 4799-4809). In July 2000, ConAgra again sent letters to the trade regarding its patent, this time offering to license the patent at a royalty of 10¢ per pound, but only, "to all responsible parties who have not infringed these patents."[3] (R. A3748-59, 4481, 4483-84, 4487-91).

Unitherm filed a Motion for Partial Summary Judgment seeking a declaration that the '027 Patent is invalid. (R. A0923-71). In its Motion, Unitherm argued and provided evidence demonstrating that the process claimed in the '027 Patent is identical to the Unitherm Process and that Unitherm had demonstrated the Unitherm Process to ConAgra and the named inventor, ConAgra employee Prem Singh, on numerous occasions prior to ConAgra filing its application for the '027 Patent. ConAgra did not disclose Unitherm or the Unitherm Process to the Patent Office in its application.

The trial court found that the invention claimed in the '027 Patent and the Unitherm Process are the same. (R. A2686, 2692-93). It held that ConAgra's Patent is invalid under 35 U.S.C. § 102(b), because the process claimed had been both

[2] These letters, dated February, 2000, described the patented process and then stated: "Others in the industry may approach your company regarding this patent, and we would appreciate it if you would inform them that we intend to aggressively protect all of our rights under this patent." (R. A4472, 4474, 4478, 4482).

[3] Unitherm introduced evidence that the competitive nature of the meat industry provided a margin of only pennies per pound and that ConAgra's offer to license at 10¢ per pound, which was never accepted by any company, was a mere ruse to prevent all others from using the process. (R. A3601-06, 3586-87).

on-sale and in public use in the United States more than one year prior to the date the patent application was filed. (R. A2692-93). The court left for jury determination the question of whether ConAgra had obtained the patent by committing fraud on the Patent Office, the essential first element of a *Walker Process* antitrust claim. (R. A2693). *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174 (1965).

At trial, the court empaneled an eight-person jury that included four people with Masters Degrees and another who held a Ph.D. (R. A3125-30). Following the presentation of Unitherm's evidence, ConAgra's counsel made an oral motion for JMOL under Fed. R. Civ. P. 50(a). (J.A. 15a-22a).[4] ConAgra's motion addressed Unitherm's common law fraud cause of action and to a lesser extent whether there were sufficient customer relations to support the tortious interference count. (*Id.*). ConAgra's motion addressed the *Walker Process* cause of action, but only to the following extent:[5]

> Well, now the plaintiff is now in, or plaintiffs' case is now in, and I realize that intent can be inferred but it has to be inferred from something and I don't believe there's evidence here that would permit that inference.

(J.A. 21a). The motion contained no reference to relevant market, antitrust injury, intent to monopolize or dangerous probability of success of monopolization. ConAgra renewed the motion at the

[4] ConAgra's counsel characterized his motion as being for "a directed verdict" (J.A. 15a, 17a), but this distinction is not material. The 1991 amendments to Rule 50 changed the terminology in the rule from "directed verdict" and "judgment notwithstanding the verdict" to "judgment as a matter of law." Fed. R. Civ. P. 50, 1991 Notes of Advisory Committee. A party's error in using the former terminology "is merely formal." *Id.*

[5] Proof that ConAgra obtained the patent by fraud on the Patent Office was also an element of Unitherm's claim for tortious interference under Oklahoma common law.

conclusion of the evidence without further comment. (J.A. 22a). ConAgra never mentioned the word "antitrust" or any element thereof in its Rule 50(a) motion.

Following eight days of trial, the jury returned a verdict in favor of Unitherm on the *Walker Process* claim in the sum of $6,000,000. (J.A. 23a-24a). The trial court thereafter trebled this amount pursuant to 15 U.S.C. § 15. (J.A. 27a-28a). The court also entered a stipulated attorney fee judgment in the amount of $1,022,445. (J.A. 33a). The jury also returned a verdict in favor of Unitherm for compensatory damages on the tortious interference count in the sum of $2,000,000, plus $2,000,000 in punitive damages.[6] (J.A. 24a-26a). The jury found in ConAgra's favor on Unitherm's common law fraud claim. (J.A. 24a).

ConAgra did not file a motion for JMOL pursuant to Rule 50(b) following the jury verdict or the judgment. ConAgra filed a pleading entitled, "Motion for Remittitur Reducing Damage Award On Antitrust Count, Or, In The Alternative, For New Trial On Antitrust Damages," to which Unitherm responded. (J.A. 34a-49a, 58a-74a). The trial court denied this motion as follows: "Defendant's argument is limited to the alleged inconsistency of the verdict. Defendant does not assert the $6 million award was not supported by the evidence. Indeed, Plaintiffs have offered evidence demonstrating a much larger amount of damages." (J.A. 118a-120a).[7]

ConAgra also filed a "Motion to Amend Judgment Entered on April 9, 2003, Pursuant to Fed. R. Civ. P. 59(e) And To Set Amount of Supersedeas Bond," to which Unitherm responded.

[6] Because the tort damages were subsumed within the antitrust damages, the trial court entered an agreed judgment for treble the amount of the SHERMAN ANTITRUST ACT Section 2 damages pursuant to 15 U.S.C. § 15. In short, the parties agreed that the amount of the tort and punitive damages was not cumulative with the amount of the antitrust damages.

[7] ConAgra did not renew its "inconsistent verdict" argument on appeal.

(J.A. 50a-57a, 105a-113a). The trial court denied the portion of the motion under Rule 59(e), because it was out of time. (J.A. 114a-117a). This motion also contained no sufficiency of the evidence arguments.

2. Proceedings Before The Federal Circuit

ConAgra appealed to the United States Court of Appeals for the Federal Circuit where it challenged the sufficiency of the evidence on nearly every element of every cause of action upon which Unitherm prevailed at trial and challenged the trial court's declaration that the '027 Patent is invalid. Ultimately, the Federal Circuit panel affirmed the trial court's declaration that the '027 Patent is invalid and affirmed the jury's verdict on the tortious interference and punitive damages claims. Although the Federal Circuit affirmed the jury's finding that ConAgra had intentionally defrauded the Patent Office to obtain the '027 Patent, it reversed the antitrust verdict citing insufficient evidence of a relevant market, antitrust injury and dangerous probability of success of monopolization.

Most germane to the issues upon which this Court granted certiorari is the Federal Circuit's view of its role in reviewing the jury's verdict. Indeed, a simple comparison among (1) the issues raised in the appellate briefs; (2) the issues decided by the Federal Circuit; and (3) the grounds upon which those issues were decided reveal the Federal Circuit's extraordinary reach to decide issues of fact and law which were not necessary to its decision and which were never addressed by the trial court or the parties' appellate briefs.

Unitherm argued to the Federal Circuit that ConAgra had waived its sufficiency of the evidence arguments on appeal by failing to raise them in Rule 50(a) motions for JMOL during the trial or renew them in a post-verdict motion for JMOL under Rule 50(b). After it had conducted an analysis of the sufficiency of the evidence of all of the *Walker Process* elements, including

fraud on the Patent Office, the Federal Circuit inserted the following footnote:

> ConAgra failed to renew its motion for judgment as a matter of law ("JMOL") after the verdict pursuant to Federal Rules of Civil Procedure 50(b). Unitherm contends that ConAgra therefore waived its right to dispute the sufficiency of the evidence supporting the jury's antitrust verdict. We have ruled as a matter of law that, for issues unique to our jurisdiction, a 50(b) motion is necessary to preserve a sufficiency of the evidence argument for appeal. *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 859-62 (Fed. Cir. 1991). On most issues related to Rule 50 motions, however, we generally apply regional circuit law unless the precise issue being appealed pertains uniquely to patent law. *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1106 (Fed. Cir. 2003). Because we decide antitrust issues that do not implicate patent law, including market definition, under the law of the regional circuits, *Nobelpharma*, 141 F.3d at 1067 n. 5, we similarly apply Tenth Circuit law to determine whether or not ConAgra has preserved its right to appeal. In the Tenth Circuit, the failure of a party to move for a JMOL post-verdict does not bar the party from appealing the sufficiency of the evidence, provided, as is the case here, that the party made the appropriate motion prior to the submission of the case to the jury. *See Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 950-51 (10th Cir. 2004). . . .

(Pet. App. 50a n.7).

At this point in the opinion, the Federal Circuit had already determined that the fraud on the Patent Office element of Unitherm's *Walker Process* claim was governed by Federal Circuit law. (Pet. App. 28a-32a). There is no dispute in this case that ConAgra failed to file a post-verdict motion raising sufficiency of the evidence as to fraud on the Patent Office. Yet, the Federal Circuit engaged in a detailed analysis of the facts and evidence relating to this element.[8] The Federal Circuit laid out all of the elements for a finding of fraud on the Patent Office and conducted a detailed factual analysis over a number of pages of the opinion for each element, far exceeding the scope of the issues raised by ConAgra. (Pet. App. 34a-42a). Indeed, the Federal Circuit's review was so far-reaching that it had to raise *sua sponte* legal issues never addressed in the briefs or the trial court so it could logically navigate its way through the facts.[9] After this stringent review of an issue which under the Federal Circuit's own footnote 7 was not preserved for appeal, the Federal Circuit affirmed the jury's finding that ConAgra had intentionally defrauded the Patent Office in its application for the '027 Patent. (Pet. App. 42a).

The Federal Circuit then reviewed the sufficiency of the evidence of the definition of the relevant market. (Pet. App. 44a-50a). It found that there was substantial evidence of the technologically

[8] In reviewing the sufficiency of the evidence of fraud on the Patent Office element, the Federal Circuit cited to this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000), addressing the general standard for appellate courts' review of sufficiency of the evidence in the face of a timely filed Rule 50 motion. "And the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" 530 U.S. at 150.

[9] The Federal Circuit addressed issues involving patent enforcement, agency law, and the procedural posture of the presence of a *Walker Process* claim combined with a request for a declaration of invalidity – all interesting issues but issues which were never raised by the parties.

unique nature of the Unitherm Process. Nevertheless, it held that there was insufficient evidence that these facts showing a lack of technological substitutability could raise a reasonable inference regarding economic substitutes.[10] ConAgra's briefs to the Federal Circuit never once argue this technical/economic substitution theory upon which the Federal Circuit based its decision.[11] Finding the evidence insufficient to support a relevant market, the Federal Circuit likewise ruled that there could not be sufficient evidence of antitrust harm or dangerous probability of success of monopolization. (Pet. App. 49a-50a).

Both Unitherm and ConAgra sought rehearing and rehearing *en banc*. ConAgra argued issues of claim construction and fraud on the Patent Office. Unitherm argued that the panel was simply and clearly incorrect in footnote 7 when it found that ConAgra had addressed the SHERMAN ANTITRUST ACT Section 2 issues at any point in the proceedings in a Rule 50 motion, and that the panel had impermissibly drawn every inference on economic substitutability in favor of ConAgra and against Unitherm and the jury's verdict. (J.A. 121a-138a). The Federal Circuit denied both parties' requests for rehearing without comment. (Pet. App. 55a-56a).

[10] Unitherm disagrees with the Federal Circuit's conclusion there was insufficient economic evidence related to a relevant market for the process, and also disagrees with the Federal Circuit's decision to substitute its own view of whether the unique nature of the process could support reasonable economic inferences that would assist the trier of fact in defining a market. Contrary to this Court's ruling in *Reeves*, the Federal Circuit "failed to draw all reasonable inferences in favor of the petitioner." 530 U.S. at 152.

[11] Further, ConAgra never once raised a distinction between "technological" and "economic" substitutability in the trial court. Those phrases were uttered for the first time by Judge Gajarsa at oral argument. Consequently, in Unitherm's Petition for Rehearing numerous trial exhibits and testimony describing the economic advantages of the Unitherm Process were brought to the Federal Circuit's attention — to no avail. (Unitherm Pet. for Reh'g and Reh'g En Banc, J.A. 129a-138a).

3. The Circuits Are Split On Appellate Review Of Sufficiency Of The Evidence When A Party Fails To Present A Post-Verdict Rule 50(b) Motion

The Federal Circuit's application of the law of different circuit courts of appeals to different elements of the same cause of action crystallizes the issues before this Court. The Federal Circuit noted in footnote 7 that if it had applied the rule set forth in its *Biodex* decision, ConAgra would have failed to preserve sufficiency of the evidence review for any issues. (Pet. App. 50a n.7).

The Tenth Circuit case relied upon by the Federal Circuit in its footnote 7 is *Cummings v. General Motors Corp.*, 365 F.3d 944 (10th Cir. 2004), where the Tenth Circuit noted the following:

> We note that the vast majority of other circuits have held that the failure to renew a motion for judgment as a matter of law following a jury verdict precludes an appellate court from reviewing the sufficiency of the evidence. *See Adames v. Perez*, 331 F.3d 508, 511-12 (5th Cir. 2003) (holding failure to file a post-verdict motion waives a sufficiency claim, limiting court to a review for plain error); *Cross v. Cleaver*, 142 F.3d 1059, 1069-70 (8th Cir. 1998) (holding, where a party fails to move for judgment as a matter of law following the verdict, the court cannot test sufficiency of evidence beyond plain error to prevent a manifest miscarriage of justice); *Patel v. Penman*, 103 F.3d 868, 879 (9th Cir. 1996); *Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 638 (2d Cir. 1995) (failure to make motion results in a waiver of challenge to sufficiency of evidence); *Velazquez v. Figueroa-Gomez*, 996 F.2d 425, 426-27 (1st Cir. 1993); *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 862 (Fed. Cir. 1991) (concluding the "failure to present the district court with a post-verdict motion precludes appellate review of sufficiency of the evidence"); *Dixon v. Montgomery Ward*, 783 F.2d 55, 55 (6th Cir. 1986); *Woods v. Nat'l Life & Accident Ins. Co.*, 347 F.2d 760, 769 (3d Cir. 1965) ("A party's failure to file a motion for judgment n.o.v. in the trial court precludes an examination of the record by that court or this court for the purposes of ascertaining whether that party was entitled to a directed verdict."); *cf. Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1234 (4th Cir. 1996) (failure to move for judgment as a matter of law pursuant to Rule 50(b) limits the court's remedial powers, but not the ability to review for error).

365 F.3d at 950 n.1. The Tenth Circuit panel in *Cummings* suggested that it would consider conforming its law to that of the other circuits, but that was beyond the panel's authority:

> Despite the fact that our approach diverges from that taken by the other circuits, we are constrained to follow our prior precedent, as we are "without power to overrule the unequivocally contrary precedent of this Circuit." *Morrison Knudsen*, 175 F.3d at 1246 n.34.

365 F.3d at 950 n.1.

The Tenth Circuit identified contrary authority in the First, Second, Third, Fifth, Sixth, Eighth, Ninth, and Federal Circuit Courts of Appeals.[12] The law in the Fourth Circuit is the same as the Tenth Circuit. *See Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1234 (4th Cir. 1996). There are no cases squarely on point in the other circuits.

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[12] A recent First Circuit case discussing the issue is *Zachar v. Lee*, 363 F.3d 70, 73-74 (1st Cir. 2004) ("If the Rule 50(a) motion is denied and the case is submitted to a jury, the movant must renew the motion once again in order to preserve the issue for appeal. *See* FED. R. CIV. P. 50(b); MARTIN H. REDISH, 9 MOORE'S FEDERAL PRACTICE § 50.41 (3d ed. 2003).").

This Court granted Unitherm's Petition for a Writ of Certiorari to resolve this split.

SUMMARY OF THE ARGUMENT

This Court has repeatedly emphasized the importance of having the trial judge, who has the "feel" of the case that no appellate transcript can impart, render judgment in the first instance on the sufficiency of the evidence. This is the philosophy that underlies Rule 50(b). Unlike verbal motions made during the heat of trial, a written motion made post-verdict serves the forces of contemplation and careful review. In the absence of a post-trial motion, the appellate court does not have the benefit of the viewpoint of the single most important, impartial participant in the trial – the judge.

A motion for new trial under Rule 59 is an appropriate vehicle for contesting a wide variety of alleged errors made during the course of a trial, but it is not the proper vehicle for arguments based on sufficiency of the evidence.

The vast majority of federal circuit courts of appeals hold that the absence of a post-trial motion for JMOL constitutes a waiver of arguments based on the sufficiency of the evidence. This jurisprudence is in harmony with the clear directions by this Court in numerous cases.

Some circuits simply hold that failure to move for JMOL post-verdict waives sufficiency of the evidence issues and that ends the matter. Other circuits hold that the only review available is for "plain error" under a "manifest injustice" standard. Here, a cursory review of the record demonstrates that there was no "plain error", and that the jury's verdict for Unitherm on its SHERMAN ANTITRUST ACT Section 2 claim should be reinstated.

Finally, a matter that is corollary to the question on certiorari, is the clear fact that ConAgra did not, *at any time*, make a Rule 50(a) motion directed to the issues it raised for the first time on appeal. Unitherm submits that this Court should reaffirm the requirement for an appropriate *initial* Rule 50(a) motion to preserve sufficiency of the evidence issues for appellate review.

ARGUMENT

I. THERE CAN BE NO APPELLATE REVIEW OF SUFFICIENCY OF THE EVIDENCE IN THE ABSENCE OF A POST-VERDICT MOTION FOR JUDGMENT AS A MATTER OF LAW.

A. Previous Decisions Of This Court Strongly Suggest That A Post-Verdict Motion For JMOL Is Mandatory For Appellate Review Of Sufficiency Of The Evidence.

This Court's jurisprudence on Rule 50(b) is primarily contained in four cases. In *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), respondent moved for new trial post-verdict but *not* for j.n.o.v. The court of appeals determined that petitioner's evidence was insufficient and directed that judgment be entered for respondent. This Court described the question on certiorari as follows:

> The petition for certiorari challenged the power of an appellate court to direct entry of a judgment notwithstanding the verdict where timely motion for such a judgment had not been made in the District Court.

Id. at 214-15. This Court stressed the importance of giving the trial judge the opportunity to address post-verdict motions for sufficiency of the evidence, as follows:

> Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) *calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart*. . . . Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded "a last chance to correct his own errors without delay, expense, or other hardships of an appeal."

Id. at 216 (emphasis supplied; internal citations omitted). This Court unanimously held that the court of appeals could not direct judgment for the respondent in the absence of a Rule 50(b) motion for j.n.o.v.

> In the absence of such a motion, we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.

Id. at 218.[13]

In *Johnson v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 48 (1952), respondent moved for a directed verdict at the close of evidence. The trial court reserved decision on the motion and submitted the case to the jury, which returned a verdict in petitioner's favor. Within ten days of the verdict, respondent "moved to have the verdict set aside." *Id.* at 49. The trial court denied this motion and also denied the pre-verdict motion for directed verdict.

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[13] The Sixth Circuit read *Cone* as requiring a post-verdict motion to preserve sufficiency of the evidence for appellate review. *Dixon v. Montgomery Ward*, 783 F.2d 55 (6th Cir. 1986).

The court of appeals reversed, holding that the motion for directed verdict should have been granted because petitioner's evidence was insufficient to support the verdict. In reversing the court of appeals, this Court stated:

> On several recent occasions we have considered Rule 50(b). We have said that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment.

Id. at 50.

This Court held that respondent's post-verdict motion to "set aside" the verdict was not the equivalent of a motion for judgment notwithstanding the verdict - and therefore the court of appeals did not have the power to direct such relief. This Court also held that the trial court's reservation of decision on the motion for directed verdict did not relieve the respondent of its duty under Rule 50(b) to renew its motion within ten days after verdict.

> The rule carefully sets out the steps and procedures to be followed by the parties as a prerequisite to entry of judgments notwithstanding an adverse jury verdict.

Id. at 51.

> This requirement of a timely application for judgment after verdict is not an idle motion. This verdict solves factual questions against the post verdict movant and thus emphasizes the importance of the legal issues. The movant can also ask for a new trial either for errors of law or on discretionary grounds.

> *The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness.*

Id. at 53 (emphasis supplied).[14] This Court noted that the respondent had moved to set aside the verdict and it could be entitled to no more than that.

In *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), respondent moved for directed verdict at the close of petitioner's evidence and again at the close of all the evidence. The jury returned a verdict in petitioner's favor. Respondent then *moved for j.n.o.v.* or, in the alternative, for a new trial "in accordance with Rule 50(b)," which the trial court denied. The court of appeals held the petitioner's evidence was insufficient and reversed with instructions to dismiss. This Court held that where the respondent *had* filed a post-verdict motion for j.n.o.v. and the record had been fully developed in the trial court, the court of appeals was within its power to direct entry of judgment for respondent. The outcome, therefore, buttresses the position that a post-verdict motion for JMOL is required before an appellate court may review sufficiency of the evidence.

In doing so, however, this Court re-emphasized the importance of the role of the trial judge:

> The opinions in the above cases make it clear that an appellate court may not order judgment n.o.v. where the verdict loser has failed *strictly to comply with the procedural requirements of Rule 50(b)*, or where the record reveals a new trial issue which has not been resolved. Part of the Court's concern has

[14] The Third Circuit read *Johnson* as requiring a post-verdict motion to preserve sufficiency of the evidence for appellate review. *Woods v. Nat'l Life & Acc. Ins. Co.*, 347 F.2d 760, 769 (3d Cir. 1965).

> been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's firsthand knowledge of witnesses, testimony, and issues — because of his "feel" for the overall case. These are very valid concerns to which the court of appeals should be constantly alert.

Id. at 325 (emphasis supplied).

In *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), respondent moved for JMOL at the close of petitioner's evidence and at the close of all the evidence, on the ground that Petitioner's expert witness testimony had been improperly admitted into evidence under *Daubert*, and that petitioner's evidence was otherwise insufficient. The jury returned a verdict in petitioner's favor. The respondent then renewed its motion for JMOL post-verdict and additionally requested, in the alternative, a new trial, pursuant to Rules 50(b) and 59. The trial court denied the post-verdict motions.

The court of appeals held the expert witness testimony had been improperly admitted in violation of *Daubert*, and that petitioner's remaining evidence was insufficient. The court of appeals directed entry of judgment for respondent.

The difference between *Neely* and *Weisgram* is that the evidence was insufficient in *Neely* and the evidence *became* insufficient in *Weisgram* when the improperly admitted evidence was excluded. This Court found this distinction did not require a different result and affirmed. *Weisgram* emphasizes the importance of the trial judge's ruling on a post-judgment motion for JMOL, and appears to read *Neely* as requiring a Rule 50(b)

post-verdict motion for appellate review of sufficiency of the evidence, *viz*:

> The remainder of the *Neely* opinion effectively complements Rules 50(c) and 50(d), providing guidance on the appropriate exercise of the appellate court's discretion *when it reverses the trial court's denial of a defendant's Rule 50(b) motion for judgment as a matter of law.*

528 U.S. at 450 (emphasis supplied).

> As *Neely* recognized, appellate rulings *on post-trial pleas for judgment as a matter of law* call for the exercise of "informed discretion," 386 U.S., at 329, and fairness to the parties is surely key to the exercise of that discretion.

Id. at 454 (emphasis supplied).

These cases appear to assume that a post-verdict motion for JMOL is required for appellate review of sufficiency of the evidence. But this issue was not expressly addressed by this Court, because in every instance a post-verdict motion for a new trial or for JMOL *had* been submitted by the verdict loser. In the instant case, the Federal Circuit did not discuss or even cite any of this Court's Rule 50(b) jurisprudence. *Indeed, the Federal Circuit never identified what ruling of the trial court it was reviewing.*[15] It merely embarked upon a wholesale review of the jury's verdict.

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[15] As a matter of theory, the Federal Circuit must have been reviewing the trial court's denial of ConAgra's pre-verdict motion for directed verdict. However, as pointed out in Part IV, *infra*, the trial court was never asked to rule on the issues upon which the Federal Circuit reversed the jury's verdict.

B. Requiring A Rule 50(b) Motion For Appellate Review Of The Evidence Serves The Purposes Of The Rule.

Rule 50(b) "was adopted for the purpose of speeding litigation and preventing unnecessary re-trials." *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 250 (1940); *see also* Fed. R. Civ. P. 1 (Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."); *Otten v. Stonewall Ins. Co.*, 538 F.2d 210, 213 (8th Cir. 1976) ("It is not the purpose of Rule 50, Fed. R. Civ. P., to precipitate unnecessary retrials.").

Review of sufficiency of the evidence under Rule 50(b) must be tempered by the Constitutionally mandated respect for the role of the jury in fact-finding and the trial court's role in overseeing trials in the district court. Indeed, while this case is about the proper circumstances under which a federal appellate court may review a jury verdict for *legal* sufficiency of the evidence, juries remain the exclusive vehicle for deciding contested issues of fact:

> But that rule [Rule 50(b)] has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact — a jury being the constitutional tribunal provided for trying facts in courts of law.

Berry v. United States, 312 U.S. 450, 453 (1941) (footnote omitted). Given the concern of invading the fact-finding duties of the jury, "[s]uch motions 'should be granted cautiously and sparingly.'" *Meloff v. New York Life Ins. Co.*, 240 F.3d 138,

145 (2d Cir. 2001) (quoting 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2524, at 252 (1995)); 9 MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE § 50.05[6] (3d ed. 2004) ("Because granting a motion for judgment may deprive the nonmoving party of a determination of the facts by the jury, such motions as a matter of law should be cautiously and sparingly granted.") (citing cases in accord from 12 circuits); *see also United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 735 (D.C. Cir. 1998) (because JMOL intrudes on rightful province of jury, it is highly disfavored).

Consistent with the purposes underlying Rule 50 and due deference to the role of the jury and the trial court, another panel of the Federal Circuit discussed in detail the benefits of requiring a post-verdict motion for JMOL as a pre-condition to reviewing the sufficiency of the evidence. In *Biodex v. Loredan Biomedical, Inc.*, 946 F.2d 850, 855 (Fed. Cir. 1991), the Federal Circuit was called upon to determine whether it should require a post-verdict motion for JMOL in order to review sufficiency of the evidence. After noting confusion among the circuits, the *Biodex* court identified a number of factors leading it to require a post-verdict motion for JMOL as a precondition for review of sufficiency of the evidence. *Id.*

The *Biodex* court focused first upon the benefits to appellate review provided by a post-verdict motion under Rule 50(b):

> First, in the preferred and best of circumstances, the district court will produce a thorough written or oral opinion on the motion for JNOV. . . . The trial judge is best positioned to review impartially and in detail the evidence and events at trial, and, "our decisional approach is aided by the trial judge's review . . . setting forth his [or her] reasons for denying the motion for JNOV." . . . The appellate process materially benefits by a comprehensive summary of the course of proceedings below and an impartial review of the

> evidence supporting a verdict. The appellant is directed to the probative evidence contrary to his or her position and the appellate court need not sift through the entire record searching for such contrary evidence.

Id. at 859 (internal citations omitted; court's brackets). Likewise, the trial court's decision on JMOL is aided by renewing the motion post-verdict, consistent with the intent of the Rule. *See also Ortiz v. Greyhound Corp.*, 192 F. Supp. 903, 905 (D. Md. 1959) ("[T]he very object of the new rules of federal procedure in providing for judgments n.o.v. (Rule 50(b)), is founded on the idea that during the trial of the original case the trial judge does not have time before the conclusion of the evidence to thoroughly review some of the questions of law that may arise."). This consideration holds more force in a long trial involving complex legal and factual issues.

The *Biodex* court was equally concerned with having the benefit of the trial court's perspective before attempting to review the sufficiency of the evidence:

> Second, the jury may have been persuaded by many considerations beyond just the credibility of a witness that are not always adequately reproduced in the transcript. The district court "has the same opportunity that jurors have for seeing the witnesses [and] for noting all those matters in a trial not capable of record." *Patton v. Texas & Pac. Ry. Co.*, 179 U.S. 658, 660 (1901). "The trial judge sits as the '13th juror' in evaluating the weight" to be given to all of the evidence, *Menefield v. Borg*, 881 F.2d 696, 699 (9th Cir. 1989), or in determining that a particular witness's testimony is so inherently incredible that a reasonable mind could not accept it.

946 F.2d at 859-60. The *Biodex* court found that the trial court's ability to judge the weight (not just the credibility) which certain

testimony should be given is also superior. It even noted that the trial court is in a superior position to determine the weight to be given to the testimony of expert witnesses testifying on technical matters. "These concerns are equally applicable to trials of patent issues as to any other." *Id.*

> In short, the printed record on appeal more often than not will not reflect all the persuasive issues that may have determined in the course of events at trial, even when that record is reviewed in its entirety by the appellate court. Thus, denial of a post-verdict motion, even in summary fashion, perforce provides the appellate court with the district court's overall assessment of the events at trial.

Id.

The *Biodex* court further concluded that requiring a post-verdict motion for JMOL "promotes fair and equitable jurisprudence." *Id.* at 860; *see also Johnson*, 344 U.S. at 53 ("The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness."). Rule 50(b) promotes efficiency in the first instance by avoiding unnecessary appeals, because "'[b]y failing to move for JNOV, the trial judge was denied the chance to correct any error by the jury.'" *Biodex*, 946 F.2d at 860 (quoting *Coffman v. Trickey*, 884 F.2d 1057, 1064 (8th Cir. 1989)).

Another consideration directly applicable to the record in this case concerns fairness to the appellee:

> If no post-verdict motion has raised issues of sufficiency of the evidence, an appellant can, by including in the record a transcript of all evidence, as happened in this case, first provide the appellee with notice of the specific factual issues in its appeal in its opening appellate brief. In such circumstances, the appellee's opportunity to respond to these specific factual issues is foreshortened as compared to the opportunity to have joined the issue earlier during the period after the verdict. ***When, as here, the appellant cites only testimony in support of its position, this disparity in opportunities is exacerbated.*** The post-verdict motion thus functions as a timely notice to benefit the appellate process, because briefing and argument are more likely to be informed and informative when the issue has already been joined in post-verdict argument.

Id. at 860 (emphasis supplied).

Here, ConAgra did not mention a challenge to the relevant market or any other SHERMAN ANTITRUST ACT Section 2 element in its pre-verdict motion for JMOL. (J.A. 15a-22a). ConAgra did not file a *Daubert* motion challenging Unitherm's expert economic testimony.[16] (Trial Transcript ("Tr.)" p. 995).[17] ConAgra did not object to that testimony at trial. (Tr. 999-1009; R. A5132-5140). ConAgra did not object to the court's jury instruction describing the relevant market. (R. A5886-89; Tr. 1463-69). ConAgra did not file a post-verdict motion for JMOL or for new trial on these or any issues regarding sufficiency of the evidence. Equally important, ConAgra never once mentioned or argued the technical versus economic substitution theory relied upon by the Federal Circuit. Unitherm was confronted with sufficiency of the evidence arguments for the first time on appeal.

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[16] *See Macsenti v. Becker*, 237 F.3d 1223, 1231-33 (10th Cir. 2001); *Marbled Murrelet v. Babbit*, 83 F.3d 1060 (9th Cir. 1996). These courts rejected the tactic whereby a party may raise a *Daubert*-like challenge for the first time on appeal in the guise of a sufficiency of the evidence argument.

[17] Citations to portions of the official trial transcript which were not contained in the Federal Circuit Appendix are referenced as "Tr.".

The Federal Circuit should have determined, as Unitherm strongly contended, that these arguments had been waived. Unitherm was seriously prejudiced by the Federal Circuit's foray through the record searching for error when Unitherm's ability to marshall its evidence had been foreshortened.[18]

On appeal, not only was Unitherm required to brief the validity of the patent (which consumed a substantial portion of the brief), it was required to address the sufficiency of the evidence of nearly every element of every claim as well as defend the trial court's jury instructions. In essence, Unitherm was required to re-argue its Motion for Partial Summary Judgment and re-try its entire case on appeal. However, the entire record in the case cannot be submitted to the Federal Circuit on appeal, without violating that court's rules.[19] Even then, the Federal Circuit's opinion addressed issues neither party raised in their briefs. Certainly, a written opinion by the trial judge (Judge Cauthron) on a post-verdict motion challenging the sufficiency of the evidence would have narrowed the issues for appeal and sharpened the parties' focus.

The *Biodex* court further found that a post-verdict motion for JMOL requirement is not burdensome. *Id.* at 861. As this Court stated in *Johnson*, "Rule 50(b) as written and as construed by us is not difficult to understand or to observe." 344 U.S. at

[18] As this Court stated in *Tennant v. Peoria & P.U. R.R. Co.*, 321 U.S. 29 (1944): "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Id.* at 35.

[19] The Federal Circuit has substantially revised Fed. R. App. P. 30, to strictly limit the contents of the appendix. *See* Fed. Cir. R. 30. Parties are prohibited from including anything not identified in the briefs, unless necessary to add context. It is unclear, therefore, how the Federal Circuit can follow this Court's admonition in *Reeves*, that a court reviewing the sufficiency of the evidence is required to review "all of the evidence in the record." *Reeves*, 530 U.S. at 150.

53. Parties will normally have briefed many of the issues prior to trial either in motions for summary judgment, motions in limine, trial briefs, briefs in support of jury instruction or otherwise. "The efficient resolution of controversies at a time of increased filings and overburdened dockets is further served by a standard for reviewability that requires a party to have set forth the specific defects in the evidentiary support for a judgment in the district court in order to obtain appellate review." *Biodex* at 861.

A decision by this Court excusing the need to file a Rule 50(b) motion to preserve sufficiency of the evidence will result in more appeals and/or more factual issues being reviewed by appellate courts. Such an outcome does not further Seventh Amendment values. It is wholly inconsistent with the longstanding and oft-repeated distinctions between the constitutional roles and competencies of juries and judges and the equally common judicial declarations of the different competencies between trial judges and appellate courts in the review of factual findings.

The opinions of this Court, *Biodex* and numerous other courts and commentators have discussed the impediments to informed appellate court review of a jury's fact finding. This concern becomes heightened when appellate courts face an ever-increasing caseload. Between January 1, 1997 and December 31, 2001, filings in the federal appellate courts grew nine percent and have continued to hit new records every year since. OFFICE OF HUM RES. & STATS., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD: RECENT TRENDS (2002); ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2004 (2005) (courts of appeals filings increased to an "all-time high").

Since the earliest days following the enactment of Rule 50, the courts of appeals have encouraged district courts not to grant directed verdicts before the jury has had an opportunity to render its own decision about the evidence. *See Fratta v. Grace Line*,

Inc., 139 F.2d 743, 744 (2d Cir. 1943). In addition to allowing the district court the opportunity for additional reflection after the verdict (as opposed to the hectic middle of a trial),[20] the circuit and district courts are in unanimous agreement that the more prudent course is to submit the case to the jury, even if the judge believes the evidence to be insufficient. 9A CHARLES A. WRIGHT & ARTHUR A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2533 at pp. 318-19 (2d ed. 1995 & Supp.) (citing numerous cases); *see also Selle v. Gibb*, 567 F. Supp. 1173, 1179-80 (N.D. Ill. 1983) ("In fact, the practice of a trial judge submitting the case to a jury for verdict, even though the evidence appears insufficient, is generally approved.") (citing cases). If a jury agrees with a trial judge who believes the evidence is insufficient, it is preferable that the jury, and not the judge, render verdict against the losing party.[21]

A rule allowing a party to appeal the sufficiency of the evidence without first filing a post-verdict motion for JMOL will reduce the incentive of a party to exercise its rights under Rule 50(b). Consequently, trial courts will be deprived of a last opportunity to order judgment that the law requires and increase the number and scope of factual issues that appellate courts will be forced to address. *See* 9A CHARLES A. WRIGHT & ARTHUR A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2521 at pp. 242 (2d ed. 1995); *see also Montgomery Ward*, 311 U.S. at 250 (Rule 50(b) adopted to avoid unnecessary retrials). If the verdict loser is convinced of its entitlement to a new trial or judgment after the verdict, it should at least be required to ask for it.

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[20] *See Ortiz*, 192 F. Supp. 903 at 905.

[21] "[T]rial judges are formally encouraged for cogent reasons of judicial economy ordinarily to submit all but the plainest cases for jury verdict subject to the reserved ruling . . . ." *Colonial Lincoln-Mercury v. Musgrave*, 749 F.2d 1092, 1098 n.3 (4th Cir. 1984); *Flannery v. Pres. & Dirs. of Georgetown Coll.*, 679 F.2d 960 (D.C. Cir. 1982) (unfortunate that district court did not follow practice of awaiting motion for j.n.o.v. before directing verdict, requiring potentially unnecessary new trial).

In sum, the majority view requiring a post-verdict motion for JMOL as a pre-condition to appellate review of the sufficiency of the evidence is most consistent with and best serves the purposes for which Rule 50(b) was enacted.

II. SUFFICIENCY OF THE EVIDENCE ARGUMENTS MAY ONLY BE RAISED BY MOTION FOR JUDGMENT AS A MATTER OF LAW, NOT BY MOTION FOR NEW TRIAL.

Rule 50(b) is concerned exclusively with the issue of sufficiency of the evidence in a jury trial. Failure to make a Rule 50(b) motion precludes appellate review of the sufficiency of the evidence. Rule 59, on the other hand, provides a far broader range for assertion of reversible error. The drafters of the federal rules found it was impracticable to enumerate all the grounds for a new trial.[22] Rule 59 gives the trial judge power to prevent what she considers to be a miscarriage of justice. If the losing party has properly preserved objections to the admission (or rejection) of evidence, to jury instructions, to claims of misconduct by the winning party, to claims of unfair and prejudicial surprise, etc., such party may be entitled, upon proper and timely motion therefor, to a new trial. Since it could never be predicted what the jury might have done if the offending evidence had not been admitted (or if the positive evidence had been admitted), or what the jury's verdict would have been in the face of any of the other claims of error, all the movant can be entitled to is a new trial, not judgment in his favor.

The waiver of the right to request judgment notwithstanding the verdict does not prevent a party from moving for new trial on the ground that the verdict is against the weight of the evidence.

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[22] Armistead M. Dobie, *Federal Rules of Civil Procedure*, 25 Va. L. Rev. 261, 299 (1939).

Velazquez v. Figueroa-Gomez, 996 F.2d 425 (1st Cir. 1993).[23] Thus, on a motion for a new trial – unlike a motion for judgment as a matter of law – the judge may set aside the verdict even though there is substantial evidence to support it. *See Lama v. Borras*, 16 F.3d 473, 477 (1st Cir. 1994).[24]

Appellate review of an order denying a motion for new trial is reviewed under a deferential abuse of discretion standard.[25] However, it has been frequently observed that an order denying a new trial on the ground that the verdict was not against the weight of the evidence, "is virtually unassailable." *Douglas County Bank & Trust Co. v. United Fin., Inc.*, 207 F.3d 473, 478 (8th Cir. 2000).

This Court analyzed the distinction between motions for judgment as a matter of law and motions for new trial in *Weisgram*, where this Court observed that a new trial motion may invoke the trial court's discretion in determining that, for example, the verdict is against the weight of the evidence, thus mandating a new trial. However, sufficiency of the evidence arguments are properly raised by a motion for judgment as a matter of law, not by a motion for new trial:

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[23] Of course, failure to move for a new trial likewise waives the issue of the weight of the evidence on appeal. *Id.* at 427.

[24] In *Poynter by Poynter v. Ratcliff*, 874 F.2d 219, 223 (4th Cir. 1989), the court stated,

> Under Rule 59 of the Federal Rules of Civil Procedure, a trial judge may weigh the evidence and consider the credibility of witnesses and, if he finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, he must set aside the verdict, even if supported by substantial evidence, and grant a new trial.

[25] An order *granting* a new trial is not appealable. *Allied Chem. Corp. v. Diaflon, Inc.*, 449 U.S. 33 (1980).

> Many rulings on evidence, of course, do not bear dispositively on the adequacy of the proof to support a verdict. For example, the evidence erroneously admitted or excluded may strengthen or weaken one side's case without being conclusive as to the litigation's outcome. Or, the evidence may abundantly support a jury's verdict, but one or another item may have been unduly prejudicial to the verdict loser and excludable on that account.
>
> * * *
>
> Such run-of-the-mine, ordinarily nondispositive, evidentiary rulings, we take it, were the sort contemplated in *Montgomery Ward*. *Cf.* 311 U.S. at 245-246, 61 S. Ct. 189 (indicating that sufficiency-of-the evidence challenges are properly raised by motion for judgment, while other rulings on evidence may be assigned as grounds for a new trial).

528 U.S. at 452 n.9.

III. THE "EXTENT" TO WHICH AN APPELLATE COURT MAY REVIEW SUFFICIENCY OF THE EVIDENCE IN THE ABSENCE OF A POST-VERDICT MOTION FOR JMOL IS EITHER NONE AT ALL, OR FOR "PLAIN ERROR" UNDER A MANIFEST INJUSTICE STANDARD.

A. Standard of Review

When an appellant fails to timely move for JMOL post-verdict, appellate courts often conduct no review of the jury's verdict for sufficiency of the evidence. *Eaddy v. Yancey*, 317 F.3d 914 (8th Cir. 2003); *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850 (Fed. Cir. 1997); *Velazquez v. Figueroa-*

Gomez, 996 F.2d 425 (1st Cir. 1993); *Dixon v. Montgomery Ward*, 783 F.2d 55 (6th Cir. 1986). In addition to the general doctrine that an appellate court will not address issues first raised on appeal,[26] "the rationale for the rule is that a party's failure to make a motion for JMOL works as a concession that sufficient evidence exists for jury to reach a verdict." 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2536 (2d ed. 1994). The appellate courts "do not reward litigants who fail, whether inadvertently or intentionally, to exercise their rights under the Federal Rules of Civil Procedure." *Eaddy*, 317 F.3d at 916.

When a party fails to make a timely Rule 50(b) motion or otherwise preserve an issue for appeal in a civil case, the appellate court may, at most, review only for plain error. However, plain error review is not merely another level of review of the sufficiency of the evidence. Properly construed, a plain error review is not directed to a review of the sufficiency of the evidence at all. Instead, "[t]he 'plain error' exception in civil cases has been limited to errors which seriously affect 'the fairness, integrity or public reputation of judicial proceedings.'" *McEwen*, 926 F.2d at 1545 (quoting *Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1460 (10th Cir. 1987)). It is an "'extraordinary, nearly insurmountable burden.'" *Royal Maccabees Life Ins. Co. v. Choren*, 393 F.3d 1175, 1181 (10th Cir. 2005) (quoting *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 802 (10th Cir. 2001)). "The 'miscarriage of justice' must be 'patently plainly erroneous and prejudicial.'" *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1408 (10th Cir. 1991) (quoting *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1516 (10th Cir.), *aff'd*, 472 U.S. 585 (1985). "[T]he plain error doctrine, especially in civil cases, should be applied only where the error is so serious and flagrant that it goes to the very integrity of the

[26] "This court will generally not address issues that were not raised and ruled upon by the district court." *McEwen v. City of Norman*, 926 F.2d 1539, 1545 (10th Cir. 1991).

trial." *Brenner v. World Boxing Council*, 675 F.2d 445, 456 (2d Cir. 1982) (internal quotation marks omitted).

The plain error concept was long confined to criminal cases and codified in Rule 52(b) of the Federal Rules of Criminal Procedure.[27] This Court reviewed for plain error in *United States v. Olano*, 507 U.S. 725 (1993), and made it clear that *if* the appellate court finds plain error, it may *in its discretion* correct it:

> Moreover, Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."
>
> * * *
>
> Rule 52(b) is permissive, not mandatory. If the forfeited error is "plain" and "affect[s] substantial rights," the court of appeals has authority to order correction, but is not required to do so.

507 U.S. at 732, 735. This Court held that the "plain error" in *Olano* did not "affect substantial rights" and reversed.

[27] In 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE § 5043, p. 236 (1977), it is stated: "Many of the reasons given for the use of the 'plain error' doctrine are simply not applicable in civil cases. Moreover, few evidentiary errors will have the required impact on the fairness of the trial." 9 MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE § 51.42 (3d. ed. 2004) states: "The standard for plain error reversal in civil cases is extremely high, and reversal is appropriate only if an error is so fundamental as to amount to a miscarriage of justice, or if the error affects 'fairness, integrity, or public reputation of judicial proceedings.'"

And in *Johnson v. United States*, 520 U.S. 461 (1997), this Court stated:

> We therefore turn to apply here Rule 52(b) as outlined in *Olano*. Under that test, before an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." . . . If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.
>
> * * *
>
> When the first three parts of *Olano* are satisfied, an appellate court must then determine whether the forfeited error "seriously affects the fairness, integrity or public reputation of judicial proceedings" before it may exercise its discretion to correct the error.

Id. at 466-67, 469-70 (internal citations omitted).

This Court found in *Johnson* that, even assuming plain error that affected substantial rights, the final requirement of the plain error test was not met. It would seem illogical to apply a less stringent standard for plain error review in civil cases, where the plain error concept migrated with much less justification for its appropriateness.[28] In summary, an appellate court should not review at all for sufficiency of the evidence in the absence of a Rule 50(b) motion for JMOL. At most, it should be only permissive, not mandatory, for an appellate court to review for

[28] In 2003, Rule 51 of the Federal Rules of Civil Procedure was amended to add a provision allowing review of *jury instructions* for plain error. *See* Fed. R. Civ. P. 51(d)(2). The Federal Circuit did not address any issue regarding jury instructions in its opinion.

plain error, and then to act only if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings."[29]

B. The Jury's Verdict In This Case Is Supported By More Than Sufficient Evidence And Is Not Subject To A Finding Of Plain Error.

The extraordinarily rare plain error or "manifest injustice" exception is not applicable to this case. One can hardly find manifest injustice where ConAgra intentionally defrauded a federal agency, the United States Patent Office, to obtain the '027 Patent. Contrary to the express teachings of this Court, the Federal Circuit conducted an independent review of selected evidence of the definition of the relevant market, antitrust injury and dangerous probability of success, drawing the inferences in ConAgra's favor. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000). The Federal Circuit's review of sufficiency of the evidence was not moored to any ruling admitting or excluding evidence or any grant or denial of a jury instruction, or to any ruling whatever made by the trial court.

The Federal Circuit's key finding is an excellent example of it drawing inferences in ConAgra's favor and ignoring the evidence favoring Unitherm. The Federal Circuit's statement that, "ConAgra's inability to attract any licensees is indicative of a lack of pricing power, *the* single most important element in defining a relevant antitrust market", (Pet. App. 48a) (court's emphasis), misses the economic reality of this case — which was not lost on the jury. When ConAgra fraudulently obtained its patent, it sought to impose a royalty of 10¢ a pound, which it knew no one could possibly pay and remain profitable. (R. A3586-87; 3603). ConAgra set the royalty unreasonably high to restrict output, not to obtain royalty income. The absence of license sales is, in fact, evidence of successful monopolization.

[29] It is well settled that even a constitutional right may be forfeited. *Olano*, 507 U.S. at 731.

Indeed, ConAgra purported to offer a license only to non-infringers, but it sent its threatening letters only to those who *had* infringed. (R. A3748-49, 4471, 4473, 4475-76, 4479-80, 4483-84, 4487-91, 4504, 4799-4809). Thus, by definition, a license was not being offered to Jennie-O, the entity ConAgra sued for infringement in its counterclaim. The Federal Circuit's opinion in this case results in a roadmap to a monopolist seeking to foreclose a nascent process market without incurring antitrust consequences — just raise prices so high that there will be no sales, there will be no evidence of "pricing power", and thus no relevant market.

The Federal Circuit panel's statement that there was no evidence from which a reasonable jury could draw economic inferences, reveals that the panel was only interested in inferences with which it agreed. Unitherm introduced into evidence letters it had written to ConAgra and Jennie-O discussing the economic benefit of the Unitherm Process as compared to the conventional batch house process which the industry was primarily using at the time. (R. A0006-08, 3728-29, 4754-55). At an operating rate of 112,000 pounds of product per day (*i.e.*, 7000 pounds per hour at 16 hours per day), the economic benefit of the Unitherm Process is $6000 per day. (*Id.*). This translates into 5.35¢ a pound. The economic significance of this benefit and the impact and importance of the patented process in the industry are thus readily apparent in light of the unrefuted testimony of Jennie-O's president that "the food industry in general . . . is a business of pennies" and that Jennie-O's overall company-wide profit in the year prior to trial was only about 3¢ a pound. (R. A3603).

By the time the industry began converting to the Unitherm Process and ConAgra filed its bogus patent application, there clearly would have been considerable price elasticity of demand had ConAgra offered a reasonable royalty. A royalty of 10% of the gross economic benefit of the process would be about a half-cent per pound and would be equivalent to about 18% of Jennie-O's average overall profit margin of 3¢ a pound. ConAgra demanded a royalty amounting to almost twice the economic

benefit of the process and more than three times Jennie-O's average margin on all products. The jury clearly understood the import of the testimony of Jeffrey Ettinger, the President of Jennie-O, that "to have to pay 10-cent-a-pound royalty on a product line makes you very uncompetitive very quickly." (R. A3603). At Jennie-O's production rate, their royalty payment to ConAgra would have been $1.8 million a year, escalated annually over many years. (R. A3600, 3602).

The record shows that there are no reasonable substitutes and that the Unitherm Process provides very large, real economic benefits. In fact, the record is filled with evidence that the Unitherm Process significantly increases product yield (typically by at least 4%), reduces labor costs, increases production capacity, reduces chilling costs, reduces heat input into the product, reduces injection requirements, improves product safety, and increases product shelf life. (*See, e.g.*, R. A3350-52, 3464-65, 3504-06, 3586-87, 3728-29, 4383-87, 4391-94, 4396-98, 4402-24, 4472, 4709-25, 4754-55, 4772, 5132-34). These benefits are all acknowledged by ConAgra in the patent itself. (*See, e.g.*, R. A0007, Col.2:16-36,47-50 and A0010-11).

A company like Jennie-O could *not go back to using the conventional batch house process if it were required to stop using the Unitherm Process* "because of the added food safety risk. In 1999 the FSIS [USDA, Food Safety Inspection Service] published a guideline for the cooling of products and the control of temperature in the products, and the old process would not meet their guidelines without significantly altering the product." (R. A3505-06). The record also contained significant evidence that other processes such as deep frying, (R. A0007, Col. 1:19-26; Col. 1:44-50, Col. 2:36-44); (*see also* R. A0007, Col.1:19-26, Col.1:27-31, Col.1:44-50, Col.2:36-44; A3280, 3339-44, 3354-55, 3669-70, 4220, 5133-34), and caramelization (R. A3280) (admission by ConAgra that caramelization does not produce a golden-brown product); (R. A3354-55)

(dull muddy color and crispy appearance), are not adequate substitutes because they do not create the same product. ConAgra's own statements and marketing materials support a reasonable inference that no reasonable substitutes exist for the process. (R. A.3670, 4010, 4017, 4021, 4075; *Br. for Pls.-Aplees to Fed. Cir.* pp. 30-31).

The Unitherm Process is a distinct process with distinct benefits and advantages that has significant money-saving consequences. (R. A3354, 3586, 5177). It is undeniable that these facts have economic consequences from which reasonable inferences about the market may be drawn. As the panel noted, "Market definition and antitrust injury . . . are intensely factual determinations." (Pet. App. 13a). The trial court properly left these issues to the jury pursuant to instructions that were not objected to by ConAgra. As previously noted, ConAgra did not file a *Daubert* motion and never objected to Dr. Mangum's (Unitherm's economic expert) methodology or testimony regarding the relevant market. Clearly there was evidence before the jury that supported the verdict and would preclude a plain error finding.

The Federal Circuit discredited Unitherm's evidence of the economic benefits of the process by focusing exclusively on inferences favoring ConAgra's arguments. In short, the Federal Circuit impermissibly substituted its judgment concerning the weight of the evidence for the jury's. This is what *Reeves* expressly held is improper. 530 U.S. at 152-53. The remedy is reinstatement of the trial court's judgment.

> Given the evidence in the record supporting petitioner, we see no reason to subject the parties to an additional round of litigation before the Court of Appeals rather than to resolve the matter here.

Id. at 153.

The Federal Circuit erroneously found that, "Mangum explicitly testified that, to the best of his knowledge, there has never been a transaction in *his* proposed relevant market." (Pet. App. 48a) (emphasis supplied). This is simply incorrect. Dr. Mangum testified that a different, hypothetical market conjured up by ConAgra's counsel did not exist.

> Q. Well, how could there be harm to a market that doesn't exist?
>
> A. I said the market *you described* doesn't exist. I've described a market that very much exists.

(R. A5154) (emphasis supplied); (*see also* R. A5132). In fact, Dr. Mangum testified there were transactions in the relevant market. (R. A5152, 5154-55). Contrary to the statements in its opinion addressing Unitherm's SHERMAN ANTITRUST ACT Section 2 claim, the Federal Circuit, itself, identified numerous transactions in the market when it affirmed the declaration of patent invalidity. (Pet. App. 23a-26a, 37a).

Further, the Federal Circuit misapprehended Dr. Mangum's testimony by confusing the market for processes with a market for food products, a confusion repeatedly advanced by ConAgra at trial, but rejected by the jury. (Pet. App. 47a). Dr. Mangum expressly testified "there are no food products in the relevant market." [30] (R. A5167, 5172; *Br. for Pls.-Aplees. to Fed. Cir. pp. 33-36*). Consumers of food products are not customers or potential customers for the patented process. The food processors who were customers for the Unitherm Process could not compete on equal footing with ConAgra in producing the precooked, whole muscle, golden-brown turkey product to the wholesale trade if they were

[30] Dr. Mangum testified: "I have not identified a relevant market involving food products, the market where people buy and sell food products. I identified a relevant market for people who are buying machinery and processes." (R. A5172).

foreclosed from receiving the cost and yield benefits of the Unitherm Process.[31]

The Federal Circuit's improper invasion of the jury's fact-finding province is clearly displayed in the opinion's discussion of antitrust injury. (Pet. App. 49a). The Federal Circuit stated that all Unitherm's economic expert did in this regard was to point to the damages expert. In fact, Unitherm's economic expert stated that the damages expert (Jeff Kinrich) would identify the "measure" of damages. (R. A5139-5140). This, after Dr. Mangum had clearly testified that the harm from ConAgra's actions was not merely harm to Unitherm as a single competitor, but harm to competition as a whole. (*Id.*). Mr. Kinrich, likewise, testified in detail about the specific harm and measure of damages incurred by Unitherm as a result of ConAgra's anti-competitive activity. (R. A5188-5205). ConAgra's actions affected a market in an anti-competitive way. *That* is antitrust injury.

The record before the Federal Circuit contained more than enough evidence to affirm the jury's antitrust verdict. There certainly was no "manifest injustice" constituting plain error in the trial court. The jury's verdict should be reinstated.

IV. THIS COURT SHOULD CORRECT THE FEDERAL CIRCUIT'S PATENTLY ERRONEOUS IDENTIFICATION OF A PRE-VERDICT MOTION FOR JMOL THAT CONAGRA NEVER MADE.

The opinion of the Federal Circuit reviewed the sufficiency of Unitherm's antitrust proof based upon an erroneous finding that ConAgra had made a pre-verdict motion for JMOL under Rule 50(a). (Pet. App. 51a n.7). Indeed, the Federal Circuit found that if the evidence were reviewed under Federal Circuit law, it could not reach the antitrust issues at all. (*Id.*). Although it acknowledged that

[31] Robert Wood, Jennie-O's Senior Vice President of Operations, testified: "If I had to compete head to head with everything using the Unitherm process and I could not use it, I would be uncompetitive in the marketplace." (R. A3586-87).

without a pre-verdict motion for JMOL even the Tenth Circuit would not address sufficiency of the evidence, it stated that ConAgra had preserved the issues with a pre-verdict Motion for JMOL.[32]

The Federal Circuit was flatly incorrect. ConAgra simply did not argue any such motion relating to the elements of Unitherm's SHERMAN ANTITRUST ACT Section 2 claim. (R. A5232-5239, 5884). The trial judge was reversed for rulings she did not make and was never asked to make. No circuit split or confusion exists under these circumstances. ConAgra waived its right to appellate review of the evidence as to the SHERMAN ANTITRUST ACT Section 2 elements. *Davoll v. Webb*, 194 F.3d 1116, 1136 (10th Cir. 1999).

A Rule 50(a) motion, by the very terms of the Rule, must "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." *See Davoll*, 194 F.3d at 1136 ("failure to move for a directed verdict on a particular issue will bar appellate review of that issue"). "The touchstone on this issue is that vague arguable references to a point in the district court proceedings do not . . . preserve the issue on appeal." *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 720 (10th Cir. 1993) (internal quotations marks omitted); *see also Cummings v. General Motors Corp.*, 365 F.3d 944, 950-51) (10th Cir. 2004) ("The motion must include all issues challenged, as the 'failure to move for a directed verdict [now motion for judgment as a matter of law] on a particular issue will bar appellate review . . .'") (quoting *Davoll*, 194 F.3d at 1136).

Unitherm submits that this Court may take notice of and address this obvious error by the Federal Circuit. As in *Reeves*, this Court should reverse the Federal Circuit and reinstate the trial court's judgment. 530 U.S. at 153.

[32] "In the Tenth Circuit, the failure of a party to move for JMOL post-verdict does not bar the party from appealing the sufficiency of the evidence, provided, *as is the case here*, that the party made the appropriate motion prior to the submission of the case to the jury." (*Id.*) (emphasis supplied).

CONCLUSION

Rule 50(b) serves a highly important function in the federal judicial system. It assigns to the trial judge, who has the same opportunity as the jurors to see the witnesses and has the "feel" of the case, the task of reviewing sufficiency of the evidence "after all his rulings have been made and all of the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone." *Cone*, 330 U.S. at 216. It is a task for which appellate courts are not well suited. If the loser of a jury trial fails to file a Rule 50(b) motion, the appellate court should not attempt to review for sufficiency of the evidence. Such review has been waived. The factual mistakes made by the Federal Circuit panel here would have been avoided if it had the informed views of the trial judge in post-verdict review. At most, a review for plain error should be only permissive, not mandatory, and should be confined to error that is so flagrant as to seriously affect the fairness, integrity, or public reputation of judicial proceedings. Such error did not occur here.

Unitherm respectfully submits this Court should reverse the Federal Circuit and affirm the trial court's judgment.

Respectfully submitted,

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